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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5881

ROBERT EDWARD MARSHALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (Appendix, 18) is reported at 470 F.2d 34.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1972, and an order amending the opinion

was filed on December 13, 1972 (Appendix 28). The petition for writ of certiorari was filed on December 13, 1972, and was granted on February 26, 1973. Jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the provisions of Title II of the Narcotic Addict Rehabilitation Act of 1966, Title 18, United States Code, §4251(f)(4), constitute a denial of equal protection by excluding from treatment those individuals who have suffered two or more prior felony convictions.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTE INVOLVED

Title II of the Narcotic Addict Rehabilitation Act of 1966, P.L. 89-793, 80 Stat. 1438, 18 United States Code, §§4251-4255, provides that:

TITLE II–SENTENCING TO COMMITMENT FOR TREATMENT

Sec. 201. Title 18 of the United States Code is amended by adding after chapter 313 thereof the following new chapter:

"CHAPTER 314–NARCOTIC ADDICTS

"Sec.
"4251. Definitions.
"4252. Examination.
"4253. Commitment.
"4254. Conditional release.
"4255. Supervision in the community.

"§4251. Definitions

"As used in this chapter–

"(a) 'Addict' means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

"(b) 'Crime of violence' includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or any attempt or conspiracy to commit any of the foregoing offenses.

"(c) 'Treatment' includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by correcting his antisocial tendencies and ending his dependence on addicting drugs and his susceptibility to addiction.

"(d) 'Felony' includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a

felony by the law of the place where that offense was committed.

"(e) 'Conviction' and 'convicted' mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include–

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided,* That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.

"§4252. Examination

"If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall receive full credit toward the service of his sentence for any time spent in custody for an examination.

"§4253. Commitment.

"(a) Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be committed under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

"(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.

"§4254. Conditional release

"An offender committed under section 4253(a) may not be conditionally released until he has been treated for six months following such commitment in an institution maintained or approved by the

Attorney General for treatment. The Attorney General may then or at any time thereafter report to the Board of Parole whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General of the Public Health Service that the offender has made sufficient progress to warrant his conditional release under supervision, the Board may in its discretion order such a release. In determining suitability for release, the Board may make any investigation it deems necessary. If the Board does not conditionally release the offender, or if a conditional release is revoked, the Board may thereafter grant a release on receipt of a further report from the Attorney General.

"§4255. Supervision in the community

"An offender who has been conditionally released shall be under the jurisdiction of the Board as if on parole under the established rules of the Board and shall remain, while conditionally released, in the legal custody of the Attorney General. The Attorney General may contract with any appropriate public or private agency or any person for supervisory aftercare of a conditionally released offender. Upon receiving information that such an offender has violated his conditional release, the Board, or a member thereof, may issue and cause to be executed a warrant for his apprehension and return to custody. Upon return to custody, the offender shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board, after which the Board may revoke the order of conditional release."

STATEMENT OF THE CASE

On February 4, 1971, petitioner was sentenced to the custody of the Attorney General for a period of ten (10) years pursuant to the provisions of Title 18 U.S.C. §4208(a)(2), following his plea of guilty to a charge of entering a bank with intent to commit a larceny in violation of Title 18 U.S.C. §2113(a). The District Court recommended that petitioner receive treatment for his narcotic addiction.

At the time of judgment and sentence, petitioner requested that the Court consider him for treatment as a narcotic addict under Title II of the Narcotic Addict Rehabilitation Act of 1966, Title 18 U.S.C. §§4251-4255. The District Court, however, indicated that the two prior felony exclusion contained in Title 18 U.S.C. §4251(f)(4) precluded any consideration of petitioner for treatment under Title II of the Narcotic Addict Rehabilitation Act.[1]

Petitioner has a record of prior convictions for burglary, forgery, and possession of a firearm. The burglary and the firearms possession occurred prior to November 8, 1966, the effective date of the Narcotic Addict Rehabilitation Act.

On October 15, 1971, petitioner filed a petition pursuant to Title 28 U.S.C. §2255 to vacate the sentence imposed as illegal.[2] The petition was denied on February 3, 1972, and an appeal was taken from that order. On

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[1] Section 4251(f)(4) of Title 18 U.S.C. excludes from the coverage of the Act, "... an offender who has been convicted of a felony on two or more occasions."

[2] The Court of Appeals considered the petition as a motion to correct an illegal sentence under Rule 35, Federal Rules of Criminal Procedure.

November 15, 1972, the United States Court of Appeals for the Ninth Circuit affirmed the order of the District Court (Opinion, Appendix 18).

On appeal, and before the District Court, petitioner urged that the exclusion contained in Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. §4251(f)(4), violated the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE HISTORICAL BACKGROUND OF THE NARCOTIC ADDICT REHABILITATION ACT OF 1966

In 1966, Congress enacted the Narcotic Addict Rehabilitation Act, P.L. 89-793, 80 Stat. 1438 (hereinafter NARA), a major revision of the federal court procedures for dealing with drug addicted individuals.

Title I of the Act (now 28 U.S.C. §§2901-2906), provides for civil commitment and rehabilitation of narcotic addicts *charged* with an offense but prior to conviction. Under Title I, if the district court believes that an eligible offender is an addict, the court may advise him that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If the election is made and he is found qualified, he will be civilly committed to the Surgeon General for treatment. If the treatment is successful, the criminal charge will be dismissed. If not successful, prosecution will be resumed. Provision is also made for supervisory aftercare.

Title II of the Act, now 18 U.S.C. §§4251-4255, with which the instant case is concerned, encompasses treatment of an individual who has been *convicted* of an offense against the United States. If the court believes that an eligible offender under that title is an addict, the court may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. If so, he may be committed to the Attorney General for treatment for an indeterminate sentence not to exceed ten years, but in no event to exceed the maximum sentence that could otherwise have been imposed.

Title III of the Act, now 42 U.S.C. §§3411-3426, provides for civil commitment of persons *not charged* with any criminal offense. This procedure is initiated by an addict who desires treatment, or by a related individual. A petition may be filed in the United States District Court to commit such person to the Surgeon General for treatment in a hospital of the Public Health Service. Again it must be determined that he is a narcotic addict "who is likely to be rehabilitated through treatment", and state facilities must be unavailable.

The first two titles contain five parallel provisions, 28 U.S.C. §2901(g)(1)-(5), 18 U.S.C. §4251(f)(1)-(5), which exclude from eligibility for treatment consideration the following classes of addict-offenders:

(1) persons currently accused or convicted under federal law of a crime of violence, 28 U.S.C. §2901(c), 18 U.S.C. §4251(b);

(2) persons currently accused or convicted under federal law of selling or importing or conspiring to sell or import a narcotic drug, except that Title II carves out of that class and makes eligible for commitment those addicts that the court finds sold "for the primary purpose of enabling the offender

to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug." 18 U.S.C. §4251(f)(2);

(3) persons against whom a felony charge (other than the one under which they are being processed) is outstanding or who have not completed a prior sentence, or period of probation or parole, unless parole or probation authorities consent;

(4) persons "convicted of a felony on two or more occasions," 28 U.S.C. §2901(g)(4), 18 U.S.C. §4251(f)(4) (the provision challenged in the instant case); and

(5) persons civilly committed three times previously under any state or any specified federal program.

The term "felony" used in the third and fourth exclusions is defined as any offense classified as a felony by 18 U.S.C. §1 or by the law of the jurisdiction in which the offense was committed at the time of its commission, 28 U.S.C. §2901(e), 18 U.S.C. §4251(d). Title III contains only the third exclusion covering any criminal charge, 42 U.S.C. §3421.

The general purpose of Congress in enacting the Narcotic Addict Rehabilitation Act was, "to provide for the treatment and rehabilitation of narcotic addicts when they are charged with or convicted of offenses against the United States." H.R. Rep. No. 1486, 89th Cong., 2d Sess., (1966), 1966 U.S. Code Cong. & Admin. News 4245, 4248.

To achieve this noble purpose Congress expanded the disposition alternatives available to federal courts in criminal cases and gave the courts discretion in utilizing the new procedures. To aid the courts in making the distinction between hardened addict-criminals deserving punishment and other addict-criminals deserving consideration for treatment, Congress created the five exclusions referred to above.

> "The definition of 'eligible individual' as set forth in the bill insures that the persons considered as candidates for civil commitment will not include criminals charged with violent crimes or be those whose records disclose a history of serious crimes." *United States v. Bishop*, 469 F.2d 1337 at 1340 n. 4 (1st Cir. 1972).

The two prior felony exclusion was apparently the mechanism intended to insure punishment for those addict offenders with a "history of serious crimes." *Bishop, supra* at 1341 n. 5.

As the Court in *Bishop* noted, Congress intended that, except for those in the excluded categories, *all* federal offenders should be eligible for treatment.

II.

THE PROVISIONS OF TITLE II OF THE NARCOTIC ADDICT REHABILITATION ACT OF 1966 DEPRIVE PETITIONER OF DUE PROCESS OF LAW

Under Title 18 U.S.C. §4251(f)(4), an offender who has been convicted of a felony on two or more prior occasions is excluded from the benefits of treatment available to other addict offenders convicted of federal offenses.

The purpose of NARA was the treatment and rehabilitation of addicts, like petitioner, charged with or convicted of federal offenses. The exclusion found in Section 4251(f)(4) of an offender who has suffered two or more prior felony convictions operates to defeat that purpose in an unconstitutional fashion by mandating the disqualification of an otherwise eligible offender regardless of the likelihood of rehabilitation, and regardless of the type of prior conviction.

Petitioner recognizes that equal protection does not require that all persons be dealt with identically. However, a basic requirement of equal protection, whether on the state or federal level, is that any distinction made between persons otherwise similarly situated (here narcotic addicts likely to be rehabilitated by treatment), have some relevance to the purpose for which the distinction is established. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); see also *James v. Strange*, 407 U.S. 128 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972).

The two prior felony exclusion has been considered and found unconstitutional by the United States Court of Appeals for the District of Columbia Circuit, *Watson v. United States*, 439 F.2d 442, 454-457 (D.C. Cir. 1970); *United States v. Williams*, 442 F.2d 738, 742 (D.C. Cir. 1970); *Chicquelo v. United States*, 452 F.2d 1310 (D.C. Cir. 1971); *United States v. Hamilton*, 462 F.2d 1190 (D.C. Cir. 1972); and by the United States Court of Appeals for the First Circuit, *United States v. Bishop*, 469 F.2d 1337 (1st Cir. 1972). But see contra *Macias v. United States*, 464 F.2d 1292 (5th Cir. 1972), petition for a writ of certiorari pending, No. 72-5539.

The Court of Appeals in *Hamilton, supra*, stressed that the disqualification of any offender who might be found to be otherwise amenable to treatment is at odds with the central purpose of rehabilitation and would therefore, require justification by reference to an independent purpose. The Court assumed three possible independent purposes and rejected each of them. The initial assumption rejected is that the two prior felony exclusion eliminates those who are not likely prospects for rehabilitation. *Hamilton, supra*, at 456.

In *United States v. Bishop, supra* at 1343, the Court, in reading §4251(f)(4) in conjunction with other parts of

the Act, found a "whole series of anomalies, in the root sense of inequalities, indicating that the disqualification lacks 'relevance to the purpose for which the classification is made.' "

The Court compared §4251(f)(4) with the exclusion of narcotic sellers contained in §4251(f)(2). Under (f)(2) a convicted seller is eligible for treatment if he can show that the sale was made primarily to support his own addiction, even if he had previously sold narcotics for profit. The Court noted that it was this dealer for profit that Congress most strongly desired excluded. Yet under (f)(4), the same individual cannot get treatment if he had been convicted of two prior narcotics sales, even though all sales were primarily to satisfy his addiction.

Such anomalies, the Court concluded, cannot be explained as a by-product of the rule employed by Congress to insure exclusion of all hardened criminals. The same rule which *excludes* hardened offenders with two prior felony convictions *includes* all hardened offenders with one prior conviction, regardless of the nature of the offense. Nor can it be argued that such classification spares courts the time needed to determine addict-relatedness. The *Bishop* Court noted that courts are called upon repeatedly to spend time examining the validity of prior convictions based upon stale evidence. Given the unanimous testimony before Congress that almost all addict-committed crimes spring from the addiction, and the uncontradicted testimony that addicts usually are arrested and convicted of several offenses in the first few years of addiction, the Court concluded that it was contradictory to conserve judicial resources as to one prior felony so as to err on the side of *including* all those deserving treatment and use the same justification as to two felonies so as to err on the side of *excluding* undesirables. *United States v. Bishop, supra,* at 1344.

The Court in *Bishop* found similar inconsistencies in comparing §4251(f)(4) with §4251(f)(1), the disqualification for those convicted of a crime of violence, as well as with §4251(d), the felony definition provision. *United States v. Bishop, supra* at 1344-45.

The Court also compared §4251(f)(4) with Title III of NARA, 42 U.S.C. §§3411-3426, the provisions permitting any narcotic addict or related individual to petition for civil treatment commitment. Since the Court of Appeals for the Ninth Circuit places great emphasis in the instant case on the existence of Title III, it is worthwhile to note the conclusion drawn by the First Circuit from its comparison of these provisions.

Under 42 U.S.C. §3412(b), following a request for commitment by the United States Attorney, the court must only find that the petitioner is "a narcotic addict who is likely to be rehabilitated through treatment" before committing him. The only persons explicitly excluded are those against whom a criminal charge is pending or those who have not completed a sentence from a prior conviction. Thus, an individual like petitioner (who is to be sentenced for his third or more felony conviction) is not eligible for commitment under NARA II; but one who has completed his sentence for his third or more felony conviction may be committed under NARA III. The *Bishop* Court believed that the distinction could not be explained on the ground that the latter individual, under Title III, is acting wholly voluntarily in requesting commitment. In the first place, the Court noted, the two prior felony disqualification is aimed primarily at avoiding lenient sentencing for, or introduction into NARA centers of, hardened criminals, and is not designed to single out those unlikely to be rehabilitated, *United States v. Bishop, supra* at 1346.

Secondly, a petition for a Title III commitment may be brought not only by the addict but also by "any person with whom the alleged narcotic addict may reside or at whose house he may be." 42 U.S.C. §3411(i). The court concluded that the procedure would often be adversary, and the resulting commitment involuntary. *Bishop, supra* at 1346.

Accordingly, the First Circuit concluded that the two prior felony conviction disqualification lacked relevance to the purpose for which it was enacted. However, the Court of Appeals for the Ninth Circuit concluded in the instant case that it was permissible for Congress in enacting Title II of NARA to limit the persons eligible to receive its benefits as it has seen fit to do.

The Court, following a general discussion of NARA, concluded that the existence of a voluntary "civil type" commitment under Title III is evidence that Congress wanted to assure that the program was entered into with a sincere good-faith desire for treatment. However, as the *Bishop* opinion demonstrates, *supra,* the two prior felony exclusion is designed primarily to exclude hardened offenders and not to insure that all who are committed under NARA do so in good faith. Moreover, a commitment under Title III is not necessarily a voluntary procedure. *United States v. Bishop, supra* at 1346.

The Ninth Circuit presumed, based upon the information and advice available to Congress, that the eligibility classifications were considered and believed to be logically suited to congressional purposes. The Court recognized that the basic purpose of NARA is the treatment of addicts who are likely to be rehabilitated, and yet, without referring to specifics in the legislative history of NARA, the Court held that for reasons such as

time, money, trained personnel and facilities available, Congress may have established a policy to exclude those whose known criminal careers made them undesired risks for rehabilitation. The Court refused to act in what it termed a legislative capacity and concluded that the reasons, apparently those reasons assumed by the Court, which prompted Congress to establish the lines of eligibility as they now stand, were not arbitary.

Accordingly, the Court below held that it could not find in the context of NARA II (and the standards of eligibility) anything departing from the rational or any discrimination which may be considered "invidious". (Appendix 26).

However, as pointed out by the First Circuit in *Bishop, supra,* the purpose of the Act is rehabilitation and the primary qualification for eligibility is a "likelihood of rehabilitation". There is no rational justification for a conclusive presumption that an addict with two or more prior felony convictions is not rehabilitable. *United States v. Hamilton, supra* at 1192. This is particularly true under the provisions of NARA since Congress provided a procedure whereby the likelihood of rehabilitation must be determined by the district court, who may seek the assistance of the Attorney General in making that determination. Title 18 U.S.C. §4252.

Despite the assumptions of the Court of Appeals below, there is precious little in the legislative history of Title II of NARA which provides any real and meaningful basis for the two prior felony exclusion of §4252(f)(4). See discussion of legislative history in *Watson v. United States, supra* at 456 n. 12. Certainly Congress, if it intends to exclude certain classes of people from the benefits of its legislation, must demonstrate that there exists a rational relationship between the exclusion and

some legitimate end to be served by such exclusion. No such demonstration has been, or can be, made in support of the two prior felony exclusion of Title II of NARA.

The arbitrariness of this classification is brought out in relief when the prison type commitment provisions of Title II are compared with the civil type commitment provisions of Title I, 28 U.S.C. §2901 *et seq.* As noted above, the exclusions are virtually identical. It is arguable, and perhaps justifiable, that Congress intended to exclude from civil commitments to the Surgeon General under Title I those addict offenders who have engaged in prior criminal behavior; but it does not follow that, because of undifferentiated prior criminal behavior, those addicts should also be denied a *prison type* commitment for treatment and rehabilitation, particularly when such treatment is available to other addict offenders otherwise similarly situated.

CONCLUSION

It is respectfully submitted that the classification here involved is not reasonably related to the declared legislative purpose, and denies petitioner equal protection of the laws. The judgment of the Court below should be reversed.

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